IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 258 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

MADHUSUDAN VEGETABLE PRODUCTS CO LTD

Appearance:

1. INCOME TAX REFERENCE No. 258 of 1993
MR MANISH R BHATT for Petitioner No. 1
NOTICE SERVED for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE A.M.KAPADIA
Date of decision: 24/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following question has been referred for our opinion for A.Y. 1983-84 :-

"Whether, the Tribunal is right in law and on

facts in excluding the expenditure on account of (a) Medical Reimbursement, (b) LTC, (c) HRA and (d) PF Contribution from the purview of Section 40A(5) ?"

2. We have heard Mrs Mauna Bhatt, learned standing counsel for the revenue. Though served, none appears for the respondent-assessee.

3. Though the question referred is one, it can be sub-divided into four sub-questions :-

(a) Medical Reimbursement
(b) LTC
(c) HRA
(d) PF Contribution

As far as medical reimbursement is concerned, our attention is invited to the decision of this Court in Ambica Mills Ltd. vs. CIT, (1999) 235 ITR 264 wherein this Court has taken the view that reimbursement of medical expenses incurred by the Director is a benefit to the Director within the meaning of Section 40(c)(i) of the Income-tax Act, 1961 and following the said decision, this Court has also held by decision dated 23.1.2001 in the case of this very assessee in Income-tax Reference No.97 of 1995 that the reimbursement of medical expenses cannot be excluded while computing disallowables under Section 40A(5) of the Act.

Accordingly, our answer to sub-question (a) is in the negative i.e. in favour of the revenue and against the assessee.

4. Coming to LTC, the provisions of clause (i) in the second proviso to clause (a) of sub-section (5) of Section 40A itself provides that while computing disallowables, the value of any travel concession shall not be taken into account. Hence, the Tribunal was right in excluding the expenditure on account of LTC from the purview of Section 40A(5).

Our answer to sub-question (b) is, therefore, in the affirmative i.e. in favour of the assessee and against the revenue.

5. Coming to HRA, clause (b) in Explanation 2 to sub-section (5) of Section 40A provides that "perquisite" means -

(i) rent-free accommodation provided to the

employee by the assessee;

(ii) any concession in the matter of rent respecting any accommodation provided to the employee by the assessee;

(iii) any benefit or amenity granted or provided free of cost or at concessional rate to the employee by the assessee;

(iv) payment by the assessee of any sum in respect of any obligation which, but for such payment, would have been payable by the employee; and

(v) ... ...

In view of the above statutory provisions, it is clear that HRA paid by the assessee-employer to its employees would fall within the meaning of perquisite referred to in clause (ii) of clause (a) of sub-section (5) of Section 40A, meaning thereby where the assessee-employer incurs any expenditure for the provision of any perquisite to an employee, in view of the wide language of clause (b) of Explanation 2, in our view, the expenditure incurred by the assessee-employer on account of HRA paid to its employees is to be excluded from the purview of Section 40A(5).

Our answer to sub-question (c) is, therefore, in the negative i.e. in favour of the revenue and against the assessee.

6. Coming to PF contribution, the provision of sub-clause (iii) in the second proviso to clause (a) of sub-section (5) of Section 40A provides that any payment referred to in clause (iv) or clause (v) of sub-section (1) of Section 36 shall not be taken into account while computing disallowables. Clause (iv) of sub-section (1) of Section 36 refers to any sum paid by the assessee as an employer by way of contribution towards a recognized provident fund or an approved superannuation fund and clause (v) thereof refers to any sum paid by the assessee as an employer by way of contribution towards an approved gratuity fund created by him for the exclusive benefit of his employees under an irrevocable trust.

In view of the above statutory provisions, the Tribunal was right in excluding the expenditure on account of the PF contribution from the purview of Section 40A(5).

Hence, our answer to sub-question (d) is in the affirmative i.e. in favour of the assessee and against the revenue.

7. The reference accordingly stands disposed of.

(M.S. Shah, J.)

(A.M. Kapadia, J.)

sundar/-